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In the Supreme Court of the United States

OCTOBER TERM, 1970

SAM NICK FARINELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 668

SAM NICK FARINELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. F) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1970. A petition for rehearing was denied on August 10, 1970. The petition for a writ of certiorari was filed on September 9, 1970. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an evidentiary hearing was required before the district court could properly deny petitioner's motion for a new trial based on alleged newly discovered evidence.

2. Whether petitioner was entitled to a new trial on the basis of a discovery, after verdict, that the jury foreman was involved in business affairs with one of the government's witnesses who testified at trial with regard to a peripheral matter.

STATEMENT

This case is before the Court for the second time. After a jury trial, in the United States District Court for the Southern District of Florida, petitioner and two co-defendants, Dara and Esperti, were convicted of robbery (Count II, Pet. App. A-1) and extortion (Count III, Pet. App. A-2).[1] The court of appeals affirmed. *Esperti* v. *United States*, 406 F. 2d 148 (C.A. 5), certiorari denied, 394 U.S. 1000. The present petition seeks review of the denial of a subsequent motion for a new trial.

The evidence showed that Jack Maloney and Joe Yeager had a profit-sharing interest in Red Ball Merchandising Corporation, a Hialeah, Florida busi-

[1] Petitioner was acquitted on three other counts involving charges of conspiracy, a second robbery, and another extortion (Tr. 1107).

ness dealing in the marketing of closeout merchandise. On September 13, 1966, Maloney was in his office preparing a bank deposit slip for a $2,000 cash deposit received on a sale by Red Ball to a Chicago customer. (Tr. 186-189).[2] He walked into Yeager's office and there saw petitioner, Dara, and Esperti as well as Yeager and an employee of Red Ball named Waldorf. Esperti threw Maloney on a couch and told him that they were "here to get the $25,000 for the man in New York" (Tr. 190-193). Esperti and Farinella both brandished guns. Esperti placed his gun alternatively to the heads of Maloney and Yeager and repeatedly demanded immediate payment of the $25,000 (Tr. 193). Dara, who had left the room, then returned with the $2,000 in cash and deposit slip from Maloney's office, remarking "Look what I found." Esperti took it from him, adding "This don't count toward the $25,000" (Tr. 120-122, 194-195). Petitioner said "You've got a lot of merchandise out there. Sell it. Get the money." (Tr. 123, 196). Petitioner, Dara, and Esperti then left with the $2,000.

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[2] "Tr." followed by page reference refers to the five volume transcript of testimony given at petitioner's trial. "App." followed by page reference refers to the appendix containing the docket entries in the district court, the motion and supplemental motion for new trial involved in this petition, and transcripts of proceedings on those motions held on August 18, 1969 and October 6, 1969. A transcript of additional proceedings held on August 18, 1969 will be referred to as "Add. Tr.", followed by page reference. All these documents are being lodged with the Clerk.

After the affirmance in the court of appeals and the denial of the petition for a writ of certiorari, petitioner filed a motion for a new trial based on allegedly newly discovered evidence (App. 1). This purported new evidence was said to be that Yeager, who had not testified at the trial, would now say that he had never made the sale which produced the $2,000 in cash involved in the theft charge. No affidavit of Yeager was submitted but the trial judge did hear argument on whether a hearing was needed. Defense counsel said that Yeager would testify that he had never made the cash sale which yielded the $2,000 (App. 23). At a later hearing, counsel said that one of the witnesses, Waldorf, would recant his testimony that he saw the money being taken (App. 37-41). Government counsel pointed out that, at the trial, defense counsel had not contended that Yeager's testimony was needed. He told the court that the government had a statement from Mr. Yeager that defendants had indeed taken $2,000 (App. 24-25). In denying the motion, the judge noted that Maloney had been subjected to a severe cross-examination at trial (Pet. App. F-2-3; App. 29, 44) and that the existence or non-existence of the $2,000 had been thoroughly explored at that time (App. 29). Against this background, the trial court was of the view that nothing could be accomplished by a hearing.

In a supplemental motion, petitioner alleged that he had learned of a business relationship between Maurie Ashman, foreman of the jury, and Harvey Goodman, a government witness. Goodman testified at trial that he had been an intermediary in an at-

tempt by petitioner to persuade Maloney to take a trip and be unavailable to testify at the trial. (Tr. 673-675, 679-686, 688-693). The defense said that it could show that Goodman, who had a surety company, put up a bond for Ashman at the bank and that both were sued on the note (Add. Tr. 4). Defense counsel also claimed that the two men were reported to have had other dealings (Add. Tr. 4). In denying the motion, the court expressed its conviction that petitioner had received a fair trial (App. 55-58).

ARGUMENT

The district court acted within the scope of its discretion in denying the motion. See *United States* v. *Johnson*, 327 U.S. 106, 111; *Batsell* v. *United States*, 403 F. 2d 395, 403 (C.A. 8), certiorari denied, 393 U.S. 1094. Indeed, the court was not required to act at all on the mere hearsay statements of counsel. Petitioner has shown none of the requisites for a motion for a new trial based on newly discovered evidence. The existence of Yeager was known at the time of trial. Petitioner and his co-defendants then made no claim that they needed his testimony and there is no reason to believe his testimony would have affected the verdict. See *United States* v. *Costello*, 255 F. 2d 876, 879 (C.A. 2), certiorari denied, 357 U.S. 937; *United States* v. *Johnson*, 142 F. 2d 588, 592 (C.A. 7), certiorari dismissed, 323 U.S. 806.

As to the ~~busi~~ness relationship between witness and juror, the only specific fact shown was that the witness acted as surety on a bond. This is not the type

of close relationship from which bias can be inferred. Moreover, the witness was not present when the taking of the $2,000 occurred, but testified only to a collateral matter. The courts below were therefore justified in finding that the alleged business relationship could not be deemed so inherently prejudicial as to require a new trial.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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